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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 231

REBA W. THIBAUT, INDIVIDUALLY, AND ON BEHALF OF THE MINOR CHILDREN, JOSEPH L. THIBAUT, JR., ET AL., PETITIONERS

versus

CAR & GENERAL INSURANCE CORPORATION, LTD., UNITED STATES BRANCH, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT,

And

ACCOMPANYING BRIEF IN SUPPORT THEREOF

FRED G. BENTON,
1016 La. National Bk. Bldg.,
Baton Rouge (6), La.
Counsel for Petitioners

Of Counsel:
KERMIT B. GUIDROZ
BERT E. DURRETT
CALVIN E. HARDIN, JR.
Baton Rouge, La.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No.

REBA W. THIBAUT, INDIVIDUALLY, AND ON BEHALF OF THE MINOR CHILDREN, JOSEPH L. THIBAUT, JR., ET AL., PETITIONERS

versus

EAR & GENERAL INSURANCE CORPORATION, LTD., UNITED STATES BRANCH, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT

---

o the Honorable the Chief Justice and the Associate Justices the Supreme Court of the United States:

The petition of Reba W. Thibaut, appearing individually nd on behalf of her minor children, Joseph L. Thibaut, Jr., nd Mary Charmaine Thibaut, for review by this Court on rit of certiorari of a judgment and decree of the Circuit ourt of Appeals for the Fifth Circuit rendered May 23, 1947, ., 345-349), as amended June 25, 1947, (R., 354), with respect, presents that:

1.

PROVISIONS OF FEDERAL CONSTITUTION, FEDERAL STATUTES AND OF LOUISIANA REVISED CIVIL CODE INVOLVED.

The following provisions of the Constitution of the United States, of the Statutes of the United States and of the Louisiana Revised Civil Code are involved in this application:

Seventh Amendment to the Constitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

Section 34 of the Judiciary Act of September 24, 1789, 1 Stat. at L. 92, Ch. 20, 28 U. S. C. A., Section 725:

> "Sec. 725. Laws of States as rules of decision. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Section 2315 of the Louisiana Revised Civil Code:

> "2315 (2294) (N 1382). Torts—Liability—Survival of action.—Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the children, including adopted children, or spouse of the deceased, or either of them, and in default of these in favor of the surviving father and mother or either of them, and in default of any of the above persons, then in favor of the surviving broth-

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ers and sisters, or either of them, for the space of one year from the death; provided that should the deceased leave a surviving spouse, together with minor children, the right of action shall accrue to both the surviving spouse and minor children; provided further, that the right of action shall accrue to the major children only in those cases where there is no surviving spouse or minor child or children.

If the above right of action exists in favor of an adopted person, such right of action shall survive in case of death in favor of the children or spouse of the deceased, or either of them, and in default of these in favor of the surviving adoptive parents, or either of them, and in default of any of the above persons, then in favor of the surviving children of the adoptive parents or either of them, and in default of these in favor of the surviving father and mother of the adopted person, or either of them, and in default of these, then in favor of the surviving brothers and sisters of the adopted person, or either of them, for the space of one year from the death.

The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife or brothers or sisters or adoptive parent, or parents, or adopted person, as the case may be. (As amended, Acts 1884, No. 71; 1908, No. 120; 1918, No. 159; 1932, No. 159, § 1.)"

2.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

Your petitioners Reba W. Thibaut, appearing individually and as natural tutrix to and for and on behalf of her minor

children, Joseph L. Thibaut, Jr., and Mary Charmaine Thibaut, respectfully present the following facts, to-wit:

First: Your petitioners on February 1, 1946, filed this suit for damages because of the death of their late husband and father (R., 2); suit was filed in the United States District Court for the Eastern District of Louisiana against several defendants; by amended complaint filed April 8, 1946, (R., 24) allowed by order of the same date (R., 31) all defendants were eliminated except Car & General Insurance Corporation, Ltd., insurer of the driver and owner of the truck with which the late Joseph L. Thibaut, husband and father of petitioners, collided. The basis of the jurisdiction of the District Court was diversity of citizenship (R., 24-25). Car & General Insurance Corporation, Ltd., was sued directly under a provision of the Louisiana Statutes authorizing direct action against the insurer (Act 55 of 1930 of the Legislature of Louisiana).

Second: Petitioners seek damages for the death of their late husband and father, caused instantly because of a collision between an automobile in which he was riding and a truck owned by defendant's assured and operated by an employee of the owner who was himself also an assured. Negligence in the maintenance, operation and use of the truck tractor and semi-trailer (sometimes referred to as truck) was charged. (R., 26).

Third: The case was tried to a jury before the late Honorable Adrian J. Caillouet, District Judge (R., 38-42). The jury returned a verdict for plaintiff Mrs. Reba W. Thibaut in the sum of $5000.00 and in favor of each of the two children for $2500.00. (R., 41-42). The jury was polled at the instance

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of defendant and each juror stated individually that the verdict as rendered was his verdict (R., 42).

Judgment was entered on the verdict (R., 316-317), and subsequently the motion of defendant to have verdict and judgment entered thereon set aside and to have judgment entered in accordance with defendant's motion for directed verdict and in the alternative for a new trial, was extensively argued and was denied for written reasons dictated into the record by the late Judge Caillouet (R., 324-335).

Fourth: Briefly, the evidence dealing with the happening of the accident was as follows: The truck tractor and trailer insured by defendant were left standing on the highway at night for several hours; no attempt was made by the insured's driver to summon assistance from Baton Rouge, only nineteen miles away (R., 303) but an attempt was made to get help from New Orleans which was approximately 65 miles away. No lights of any kind were left burning on the rear of these vehicles, as required by law (R., 67, 73, 80, 84, 96, 101, 118, 132). The Court of Appeals concluded as a fact that the truck tractor and semi-trailer became "disabled and immovable in the highway" (R., 346); but from the evidence at least one juror during the trial concluded otherwise, for he asked permission to ask the presiding judge a question and said:

> "This law about the fifteen-foot clearance is not quite clear to me, because I believe that this driver could have pulled off the highway—" (R., 268).

Less than fifteen feet of clear pavement was left opposite the stopped truck-tractor and trailer (see Exhibits D-1 to D-6). If there was one flare placed behind the trailer, it was

burning very weakly, and was improperly placed and was so close to the trailer as to constitute a snare and deception to an approaching motorist, since the law required that such a flare be placed approximately 100 feet to the rear of a stopped truck and that it be visible from a distance of 500 feet, and the most that could be said from the evidence was that the flare was about 15 to 20 feet behind the semi-trailer and was visible for a distance not greater than 150 feet (R., 67, 73, 80, 84, 118). Other motorists had very narrowly escaped colliding with the truck-tractor and trailer shortly before the fatal accident (R., 67, 71, 74, 75, 76). The situation was so dangerous that after the fatal accident several flares were borrowed from a passing motorist and properly set out (R., 85, 106, 201, 306).

There was no generalized fog on the highway (R., 179), but right at the scene of the accident there had just descended at the time of the accident a small pocket of fog (R., 102, 106, 112, 119, 122). Even after the accident, because of the spot of fog at the scene and the absence of lights on the rear of the trailer and the absence of proper flares, a motorist approaching from the rear could see nothing except a flashlight being used by one of the first persons to reach the scene (R., 101, 112).

There were no eye-witnesses to the accident itself; but the tracks left by the automobile showed that in exercising his natural instinct and the first law of nature, the instinct of self-preservation, the automobile driver had attempted to swerve around the truck (R., 105, 119, 121, 123). At the time of the accident a car was approaching from the opposite direction with headlights burning (R., 291); and it is common

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knowledge that oncoming headlights will, either partially or completely, temporarily obstruct a driver's vision so as to prevent him from observing a deceptive obstruction unlawfully blocking the highway ahead of him.

Fifth: The case was appealed to the Circuit Court of Appeals for the Fifth Circuit by the respondent insurer, and although no designation of points on appeal was filed, the appellant urged numerous alleged errors in the admission and rejection of testimony, and in the refusal to give certain charges requested by respondent insurer, and error in overruling the motion for a directed verdict filed by respondent insurer and in not setting aside the verdict and judgment rendered thereon and in not granting a new trial.

The Circuit Court of Appeals, speaking through McCord, J., noticed only the question of the sufficiency of the evidence and reversed the judgment, holding that the verdict of the jury was not supported by the evidence in this record. (R., 345-349, 354).

The Circuit Court of Appeals concluded that the present case could be distinguished from the two recent decisions by the same Circuit Court of Appeals, namely *New Amsterdam Casualty Company vs. Ledoux*, 159 F. (2d) 905, and *Car & General Insurance Corporation vs. Cheshire, et al.*, 159 Fed. (2d) 985, both Louisiana cases, wherein jury verdicts for motorists who were involved in collisions at night because of obstructions unlawfully left in the highway, had been affirmed (R., 347). In its opinion the Circuit Court of Appeals made no mention whatever of the overwhelming evidence to the effect that there were no lights whatsoever on these ve-

hicles which had been left parked on the road for several hours; the Circuit Court of Appeals made no mention whatever of the fact that there was an oncoming automobile which was perceived by the operator of the truck tractor and trailer (who was in the cab of the truck tractor) just before the collision; and the Circuit Court of Appeals stated that one burning flare was placed to the rear of the trailer but failed to mention that the flare, according to *all* the evidence, did not comply with the Law of Louisiana as to visibility or location; and the Circuit Court of Appeals failed to follow the well established principle of Louisiana Law, specifically stated in the case of *Car & General Insurance Corporation, Ltd., vs. Cheshire, et al., supra,* by this very same Court of Appeals, to the effect that:

> "In Louisiana motorists have the right to presume and act upon the presumption that the way is safe for ordinary travel, even at night. This is particularly true where a deceptive obstruction has been negligently placed in his way."

Many, many Louisiana cases, which will be referred to in detail in the brief appended hereto, have stated that in Louisiana no hard and fast rule can be established to determine what is or is not contributory negligence as a matter of law in cases involving rear end collisions. In all cases, the particular and exceptional facts of that case must be examined. Since that is, without question, the Louisiana rule, it follows necessarily that in all such cases a jury question is presented.

The Circuit Court of Appeals seemed impressed by the fact that there was some evidence that shortly before the accident Mr. Thibaut "appeared to have been drinking" (R.,

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346). The Court failed to mention there was substantial evidence that Mr. Thibaut was not intoxicated but had "control of himself" (R., 64, 214-215). This was a question of fact for the jury and we believe it was wrong for the Appellate Court to substitute its judgment for that of the jury. Not a single witness testified that Mr. Thibaut was intoxicated and the mere fact that a person has taken a drink is not, under Louisiana law, enough to justify the conclusion that he was intoxicated or even under the influence of whiskey to any degree (See *Waters, et al. vs. Meriwether Transfer Company, Inc.* (La. App., 1931) 137 So. 578.

Sixth: Petitioners instituted this proceeding to secure a review and reversal of the judgment of the Circuit Court of Appeals and to establish that the Circuit Court of Appeals has deprived the petitioners of their right to jury trial guaranteed by the Seventh Amendment to the Constitution of the United States, and has wrongfully disregarded a jury finding upon issues of fact when such finding was supported by competent evidence.

3.

JURISDICTIONAL STATEMENT

1. The jurisdiction of this Court is invoked pursuant to Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938; U. S. C. A., Title 28, Sec. 344.

2. The date of the original judgment of the Circuit Court of Appeals sought to be reversed is May 23, 1947 (R., 345-349); petition for rehearing was filed June 9, 1947, within the time prescribed by the Rules of the Fifth Circuit Court of

Appeals (R., 350-353); the opinion was amended and the petition for rehearing was denied by a Per Curiam June 25, 1947 (R., 354); on July 1, 1947, the issuance of the mandate was ordered stayed for thirty days from said date.

3. Petitioners invoke the jurisdiction of this Court on the ground that in finding against the petitioners in whose favor a jury verdict had been rendered in the District Court, the Circuit Court of Appeals deprived your petitioners of the right to trial by jury as guaranteed to them by the Seventh Amendment to the Constitution of the United States, thereby deciding a Federal question in a way which conflicts with the Constitution of the United States and with the applicable decisions of this Court holding that no finding of fact made by a jury in a law case upon substantial evidence can be re-examined by the judge or judges of a Federal Court.

4.

QUESTIONS PRESENTED

The following questions are presented in the case at bar, in which the local jurisprudence was applicable since jurisdiction of the District Court rested on diversity of citizenship:

1. In failing to apply the principles of Louisiana Law announced in many Louisiana cases and in *Car & General Insurance Corporation, Ltd. vs. Cheshire, et al., supra,* did the Fifth Circuit Court of Appeals err in refusing to agree with the late Judge Adrian J. Caillouet to the effect that a jury case had been made?

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2. In reversing the judgment of the District Court based on a jury verdict for petitioners did the Fifth Circuit Court of Appeals deny to petitioners the right to trial by jury guaranteed to petitioners by the Seventh Amendment to the Constitution of the United States?

5.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

Your petitioners, the indigent widow and children (one of the children having been born posthumously) of the late Joseph L. Thibaut, are deeply aggrieved by the action of the Fifth Circuit Court of Appeals in reversing substantial judgments based on jury verdicts in their favor for the death of their husband and father. Petitioners request this Court to note that the three circuit court judges who decided this cause are all from states other than Louisiana. The late District Judge Adrian J. Caillouet, who was thoroughly versed in the theory and application of the Louisiana Civil Code and in the jurisprudence of Louisiana by training and experience, held that a jury case had been made. The charge of the Court was full, complete, and thoroughly fair to all parties (R., 244-269). The ruling of the late Judge Caillouet in denying the motion of the respondent insurer to have the verdict and judgment set aside, and alternatively, for a new trial, indicated a thorough study of all the authorities relied upon by the respondent insurer, and a complete analysis of all the testimony (R., 324-335). Said Judge Caillouet:

> "The Court is constrained, no matter how much it is impressed by the earnestness of counsel, to continue

feeling that justice, such as the law wishes done, has actually been done in this case." (R., 335).

Briefly, we submit the following. It is well settled in Louisiana that no hard and fast rule of law can be applied to determine whether or not a motorist is guilty of negligence for failure to see an obstruction in the road ahead of him.

There was abundant evidence in this record to prove that the operator of the truck tractor and trailer was guilty of negligence. The evidence was conclusive to the effect that he had no lights whatsoever on or about the truck tractor and trailer; that the weakly burning flare, if he had any at all behind the trailer, was not properly placed and could not be seen at the distance required by law. These vehicles had been left on the highway several hours, without leaving fifteen feet of clear pavement for the unobstructed passage of other vehicles; and juror No. 11 after having heard all the evidence and having seen pictures of the allegedly disabled vehicles, stated that he believed that the driver could have driven off the highway onto a wide grassy shoulder which would have left the concrete highway free for passage (R., 268). Obviously, from the verdict, the other jurors felt the same way. All of this, under Louisiana Law, amounted to negligence in the maintenance, operation and use of truck tractor and trailer.

It cannot be questioned that this negligence was the proximate cause of the accident. If these vehicles had been moved off the concrete pavement as the juror said they could have been, Mr. Thibaut would not have been killed. Also obviously, if lights had been burning on the rear of the trailer as required by law, Mr. Thibaut could have seen these vehicles sooner and

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could have avoided striking them. Also, obviously, if there had been a flare one hundred feet behind the trailer as required by law, visible for a distance of five hundred feet further as required by law (instead of only one weakly burning flare placed about fifteen or twenty feet behind the trailer and visible for no more than one hundred fifty feet) Mr. Thibaut could have seen the flare sooner and his death would not have occurred.

The respondent insurer pleaded contributory negligence on the part of Mr. Thibaut. The Louisiana Law is clear to the effect that the burden of proving contributory negligence is on the one who alleges it. Accordingly, this burden was on defendant and it was a question for the jury as to whether or not defendant sustained that burden. As above stated, the Louisiana law is that no hard and fast rule can be laid down to determine what is or is not contributory negligence as a matter of law.

There was evidence to show that there was a small pocket of fog right at the scene of the accident which enveloped these vehicles obstructing the highway; there had been no generalized fog along the highway and therefore Mr. Thibaut was justified in driving as fast as he cared to drive. There was no speed limit whatsoever at the place where this accident took place. If there was a pocket of fog which enveloped these parked vehicles, Mr. Thibaut would be excused in law for failing to see them sooner, particularly since they were not properly lighted and proper flares were not placed around them.

There was further evidence that there were oncoming headlights at the time of the acident and the logical inference for the jury to draw was that those headlights blinded Mr. Thibaut, thus preventing him from seeing this unlawfully placed object sooner. Many, many cases in Louisiana have held that a motorist who is blinded by oncoming headlights is excused for running into an unlighted object on the highway.

Irrespective of all these points, it is conceded that there were no direct eye-witnesses to the accident. That being true, a presumption arises that Mr. Thibaut acted with ordinary care, this presumption being founded on the instinct of self-preservation; and petitioners had an absolute right to go to the jury on that presumption alone.

6.

Applicants allege that the rules of this Court have been fully complied with.

CONCLUSION

WHEREFORE, for the reasons stated herein, it is respectfully submitted by petitioners that this case is one calling for the exercise by the Court of its discretionary powers, in order that the errors herein pointed out may be corrected; in order that petitioners may not be deprived of their constitutional right to trial by jury; in order that justice may be done. And to such ends, petitioners respectfully submit that a writ of certiorari should be granted and that this Court should review

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the decision of the Circuit Court of Appeals for the Fifth Circuit and finally reverse it.

REBA W. THIBAUT, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN JOSEPH L. THIBAUT, JR., AND MARY CHARMAINE THIBAUT.

By _____

FRED G. BENTON
Attorney at Law
1016 La. National Bk. Bldg.
Baton Rouge 6, Louisiana
Counsel for Petitioners.

OF COUNSEL:
Kermit B. Guidroz
Bert E. Durrett
Calvin E. Hardin, Jr.

Baton Rouge, Louisiana.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF JURISDICTIONAL GROUNDS

A concise statement of the grounds on which the jurisdiction of this Court is invoked will be found in the accompanying petition at page 9.

STATEMENT OF THE CASE

A concise statement of the case containing all that is material to the consideration of the questions presented with appropriate page references to the printed transcript will be found in the accompanying petition at page 3, prepared and presented as required by Rule 12.

SPECIFICATION OF ASSIGNED ERRORS

A specification of the questions involved and of the errors attributed to the Circuit Court of Appeals which are intended to be urged before this Court will be found in the accompanying Petition at pages 10-11, all as is required by Paragraph 2 of Rule 38.

ARGUMENT

We consider first the question of the negligence of the operator of the truck tractor and trailer. Respondent insurer contended that it was disabled and could not have been moved. As previously mentioned, at the close of the evidence, one juror stated otherwise, and all jurors must have concluded otherwise. But assuming that respondent insurer was correct

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in this particular, and that the Circuit Court of Appeals was correct in substituting its judgment on that point for that of the jury, this would not excuse the respondent insurer from liability. In such a case, the law of Louisiana specifically states that:

> "...it shall be the duty of the owner or driver of any such vehicle to remove the same as soon as possible and until removed to protect traffic from same at his responsibility." (Act 286 of 1938 of Louisiana, Section 3, Rule 15—Dart's Louisiana General Statutes, 1939 Edition, Vol. 4, Section 5220.)

This driver of this truck tractor and trailer did not undertake to protect traffic at all; he got in the cab of his truck tractor and trailer and sat there. He made no effort to obtain aid from Baton Rouge only nineteen miles away, where every man on the jury knew there were many competent garages who could have sent aid at once. These large vehicles could have been removed from this highway within thirty minutes or less after they were brought to a stop; but they remained there at night for several hours until this fatal accident occurred. The obvious reason the driver of the truck did not call Baton Rouge for help was because his employer had a mechanic in New Orleans and of course he wanted to save money for his employer by having the employer's own mechanic come to the scene rather than to employ some third person. In this case, as the Jury well knew, this saving of money cost the lives of two men.

With respect to the placing of flares, Act 164 of 1936 of Louisiana, Section 1 as amended by Act 215 of 1942 of Louisiana, Section 2 (Dart's Louisiana General Statutes, 1939 Edi-

tion, Vol. 4, Section 5309.5) provides that the operator of a motor truck or combination of vehicles shall immediately upon bringing his vehicle to a stop upon the travelled portion of a highway, at night, place three lighted flares—one in front of the vehicle approximately one hundred feet, and one at the side of the vehicle, and "one lighted flare approximately one hundred feet to the rear of said vehicle"—and that these flares shall be "plainly visible for a distance of five hundred feet." The Court of Appeals in this case said that there was evidence that one lighted flare was placed to the rear of the trailer, and mentions that the evidence is in conflict as to the distance of the flare. (R., 346). The Court fails to mention that the great preponderance of the evidence was to the effect that the only flare behind the truck was burning very weakly, that it was about fifteen to twenty feet behind the trailer, and that it could not be seen any further away than one hundred fifty feet (R., 66, 67, 73, 80, 84, 100, 118, 137).

Completely aside from the so-called "Flare Statute" of Louisiana, there are many provisions in the Louisiana Highway Regulatory Act requiring lights on vehicles stopped on the highway. Act 286 of 1938 of Louisiana, Section 9, subsection (g), paragraph 24 (Dart's Louisiana General Statutes, 1939 Edition, Vol. 4, Section 5239) specifically states that whenever a vehicle is stopped upon a public road whether attended or unattended, at night, there shall be displayed a lamp "projecting a red light, visible, under (normal atmospheric) conditions, from a distance of five hundred feet to the rear." In other words, Louisiana Law made it mandatory that the lights on the rear end of this trailer be kept burning, and

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that the lights themselves be visible five hundred feet to the rear of the trailer. The evidence was conclusive to the effect that there was no compliance whatsoever with this provision (R., 67, 73, 80, 84, 96, 101, 118, 132). No mention whatever was made by the Circuit Court of Appeals of this violation of a safety statute by the operator of the truck tractor and trailer.

We therefore respectfully submit that there was abundant evidence to the effect that no lights whatsoever were left burning on the parked trailer as required by Louisiana Law; that fifteen feet of clear pavement was not left for the unobstructed passage of other vehicles as required by Louisiana Law; that if there was a lighted flare behind the trailer it was placed only fifteen or twenty feet behind the trailer (instead of one hundred feet as required by law) and was burning weakly and visible only for a distance not exceeding one hundred fifty feet (instead of five hundred feet as required by law); that even if the Circuit Court of Appeals was correct in substituting its opinion for that of the jury as to whether or not these vehicles could have been moved, no timely attempt to get aid from Baton Rouge, Louisiana, where aid was readily available so as to move the vehicles, was made, and no attempt was made by the driver of these vehicles to "protect traffic from same at his responsibility" as required by Louisiana statutory law.

It cannot be doubted that this truck driver was guilty of the grossest kind of negligence.

This case is markedly similar to that of *Hanno vs. Motor Freight Lines* (La. App. 1931, cert. den. by Sup. Ct.), 134 So.

317 where a motorist struck the rear end of a disabled vehicle on the highway at night. The case arose before the so-called "Flare Act" and the only violation charged and proved was that there were no lights burning on the rear of the parked truck. The Louisiana Court said this:

> "Looking for what was the proximate cause of the accident, as we must in order to fix liability, we certainly believe that it was the absence of lights or of any warning whatever of the presence of this large truck at night on the public highway. The State Statute, No. 296 of 1928, § 57, required that the one in charge of that truck display on it 'one or more lamps projecting a white light visible under normal atmospheric conditions from a distance of five hundred feet to the front', and also a red light 'visible under like conditions from a distance of five hundred feet to the rear.' This is not a rigid regulation, and it is a very precautionary one. Had it been complied with in this case, there is little reason to believe that this accident would have occurred."

These plaintiffs of course had the burden of proving that the operator of the truck tractor and trailer was guilty of negligence which proximately caused the accident. Beyond doubt, they carried that burden. If the respondent insurer was to escape liability on its plea of contributory negligence, the burden of sustaining that plea, under Louisiana Law, rested on the respondent insurer. This was specifically charged by Judge Caillouet, without exception to that portion of his charge being raised. (R., 250.) See:

> *Althans vs. Toye Bros. Yellow Cab Company, et al.* (La. Appeal, 1939) 191 So. 717.
>
> *Meyer vs. Rein* (La. Appeal, 1944) 18 So. (2d) 69.

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Nezat vs. General Outdoor Advertising Company (La. Appeal, 1946) 24 So. (2d) 482.

In considering the special plea of contributory negligence, we submit that under Louisiana Law petitioners were entitled to the benefit of two presumptions, and that under either presumption—and certainly under both—it was for the jury to determine whether or not the respondent insurer carried the burden imposed upon it of overcoming those presumptions. In other words, we submit that the petitioners had a right to go to the jury on the presumptions alone.

The first presumption, announced by the Louisiana Supreme Court in the case of *Jacobs vs. Jacobs*, 141 La. 272, 74 So. 992, L.R.A. 1917 F., 253, repeated in more than a score of Louisiana cases thereafter, and announced by this same Circuit Court of Appeals in the case of *Car & General Insurance Corporation vs. Cheshire, et al.*, 159 F. (2d) 985, is that:

> "In Louisiana motorists have the right to presume and act upon the presumption that the way is safe for ordinary travel, even at night."

The late Mr. Thibaut had a right to rely upon that presumption, and to act upon it. That, alone, was sufficient to take this case to the jury.

The second presumption, as expressed in the Louisiana case of *Layne vs. Louisiana Power & Light Company, et al.* (La. App., 1935), 161 So. 29 at page 35, (affirmed after rehearing), 164 So. 345, (judgment amended on rehearing to allow interest), 164 So. 672, is this:

> "... where there are no eye witnesses to any acts of negligence on the part of plaintiff, it is presumed that he acted with ordinary care . . . The reason for this rule of law is that life is dear to the normal person, and that he will not willingly do the thing which will extinguish it, but, on the contrary, will exercise due care to preserve it."

It is conceded that there were no eye-witnesses to this accident, and that there were no eye-witnesses to any acts of negligence on the part of the late Mr. Thibaut. Did the respondent insurer overcome the presumption above mentioned? The jury said no, and this was for the jury to determine. In fact, there was evidence (R., 120) that Mr. Thibaut applied his brakes for a witness testified that he saw tracks behind the car and that "it looked like he tried to slam his brakes, or something"; and there was evidence (R., 123) that Mr. Thibaut tried to swerve around the semi-trailer. Obviously, then, he saw this large object; but he saw it too late to save his life, and his failure to see it sooner was because the driver of the truck tractor and trailer had in so many respects failed to comply with the Louisiana Safety Statutes.

On these two presumptions alone, or on either of them, a case for the jury was made out; and this is particularly true when it is borne in mind that under Louisiana Law the burden of proving contributory negligence was placed upon the respondent insurer, and remained there throughout the trial of the case.

But beyond those presumptions, there was credible evidence offered by petitioners to justify the jury in believing that there were exceptional circumstances which explained

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why Mr. Thibaut did not see this unlighted semi-trailer sooner. The photograph shows that this semi-trailer was of the stake body type and thus it did not present a solid object. As previously indicated, there was abundant evidence that there was no generalized fog along the highway that night, and therefore there was no reason for a motorist to be driving slowly because of any foggy or misty condition of the weather. There was very little traffic on the highway; there was no speed limit fixed at that time; and rapidly moving traffic is the rule on that highway rather than the exception. The highway is referred to as the "Airline Highway." Of course no one knows how fast Mr. Thibaut was driving but we believe he was driving somewhere in the neighborhood of fifty miles an hour, which was perfectly lawful and proper at that time and place.

There was, however, evidence that right at the scene of the accident, so as to envelope the truck tractor and semi-trailer, there was and had just descended a small pocket of fog (R., 102, 106, 112, 119, 122). This was, to use the exact language of the Circuit Court of Appeals in its opinion of May 23, 1947, herein, one of the "exceptional facts and circumstances" (R., 347) which the jury had a right to consider and apparently did consider, and which that Court said may make a case for recovery of damages.

Besides that, the truck driver himself, who testified by deposition on written interrogatories, and who for that reason could not be closely examined on this particular point, gave this very significant testimony in answer to direct interrogatory No. 8 (R., 290-291):

> ". . . was about 11:45 I walked into the front of the truck and sat down. I was watching a car coming towards me, and I heard a car coming at a high rate of speed and all at once there was a crash at the rear of the trailer and I went through the windshield."

We direct Your Honors' particular attention to the statement above that "I was watching a car coming towards me."

It is a matter of common knowledge that oncoming headlights will, either partially or completely, temporarily obstruct a driver's vision so as to prevent him from observing an obstruction blocking the highway ahead of him. Many, many cases in Louisiana have recognized that proposition, and have held in such a situation that a motorist is not negligent in striking an unlighted object in the highway ahead of him when he is temporarily blinded by oncoming headlights. The Fifth Circuit Court of Appeals recognized it in *Car & General Insurance Corporation, Ltd. v. Cheshire, et al.*, supra.

The Circuit Court of Appeals made no mention whatsoever of the above quoted testimony, and failed even to discuss the argument made by petitioners, to the jury, to the late District Judge, and to the Judges of the Circuit Court of Appeals, to the effect that the jury had a right to believe that Mr. Thibaut was suddenly and temporarily blinded by oncoming headlights and therefore this case falls within the many Louisiana cases which permit recovery under such circumstances. We cannot explain the failure of the Circuit Court of Appeals to consider this argument, and at least to mention it. It was urged in brief, in oral argument, and in petition for rehearing. Evidently the Circuit Court of Appeals simply rejected the above evidence for in no other way could the failure of the Circuit

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Court of Appeals to consider this argument, be understood. In rejecting that evidence, the Circuit Court of Appeals invaded the province of the jury and clearly committed error.

If that evidence is accepted—as it must have been by the jury—and if Mr. Thibaut was blinded by the headlights of this oncoming automobile, that recovery is justified under Louisiana Law is beyond doubt. In one of the leading Louisiana cases on this subject, *Gaiennie vs. Cooperative Produce Company, Inc., et al.* (Supreme Court, November 4, 1940, rehearing denied December 2, 1940) 196 La. 417, 199 So. 377, as stated by the Supreme Court the facts were that as plaintiff passed the last of a series of cars whose dazzling headlights caused momentary impairment to his ordinary vision, his car in the meantime covering such distance as its speed carried it, he found himself confronted with the truck parked on the highway without any sign or warning of its presence, some eight or ten feet ahead of him. He struck the rear end of that truck with considerable force, causing very, very serious personal injuries. Recovery was allowed by the Louisiana Supreme Court. We can state to Your Honors with certainty that in every case in which the Louisiana Supreme Court has considered rear end collisions, at night, it has invariably stated that no hard and fast rule can be adopted to determine whether or not the following motorist was guilty of negligence, but that in every single case all of the facts and circumstances must be weighed and considered before a conclusion can be reached. That being the Louisiana rule, it seems too plain for argument that, in a Federal Court, the Seventh Amendment to the Constitution of the United States guarantees that it shall be a jury who shall weigh those facts and circumstances

and who shall determine the ultimate question of fact—that is, was there or was there not negligence.

A great many Louisiana cases have allowed recovery to a motorist colliding with an object on the highway at night. If Your Honors care to examine a few of them, we refer you to the following:

Kirk vs. United Gas Public Service Company (Louisiana Supreme Court, 1936) 185 La. 580, 170 So. 1.

Herring vs. Holicer Gas Company (Louisiana Appeal, 1945, certiorari denied by Supreme Court) 22 So. (2d) 868.

Hanno vs. Motor Freight Lines (Louisiana Appeal, 1931, certiorari denied by Supreme Court) 134 So. 317.

Stafford vs. Nelson Brothers (Louisiana Appeal, 1930, certiorari denied by Supreme Court) 130 So. 234.

Holcomb vs. Perry (Louisiana Appeal, 1932) 138 So. 692.

Williams vs. Campbell, et al. (Louisiana Appeal, 1938) 185 So. 683.

Warnick et al. vs. Louisiana Highway Commission (Louisiana Appeal, 1941) 4 So. (2d) 607.

Holloway vs. Pure Oil Company (Louisiana Appeal, 1931) 135 So. 381, 136 So. 748.

A very recent decision arising from the Eighth Circuit Court of Appeals, which is very similar to the instant case, and in which the Eighth Circuit Court of Appeals simply affirmed by a Per Curiam, is the case of *Hoffman et al. vs. Lippner* (District Court, E. D. Pennsylvania, September 4, 1946) 71 Fed. Supp. 178 (Eighth Circuit Court of Appeals, March 14, 1947) 160 F. (2d) 1022 (Advance Sheets, June 9, 1947).

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In several recent cases Your Honors have indicated that you are consistently following the principle announced in the case of *Jacob vs. City of New York*, 315 U. S. 752, 62 S. Ct. 854 (1942) to the effect that:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by Statute, should be jealously guarded by the Court."

See the following cases:

Lavender vs. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 692 (1946).

Ellis vs. Union Pac. R. Company, 67 S. Ct. 598 (Advance Sheets, February 15, 1947).

Myers vs. Reading Company, 67 S. Ct. 1334 (Advance Sheets, June 15, 1947).

The Louisiana jurisprudence and the Louisiana trained District Judge, who has since departed this life, in the case at bar both agreed that petitioners had made a case for the jury. The decision of the Circuit Court of Appeals below substituted its determination on this point for the verdict of a Louisiana jury. The action of the Circuit Court of Appeals is clearly violative of the Seventh Amendment to the Constitution of the United States, and clearly does not follow the principles laid down by Your Honors in the case of *Jacob vs. City of New York*, supra, and the other cases just above mentioned.

CONCLUSION

Petitioners humbly request this Court to exercise its discretionary powers to the end that justice may be served and that the judgment of the District Court be reinstated.

Respectfully submitted.

MRS. REBA W. THIBAUT, INDIVIDUALLY AND AS NATURAL TUTRIX TO AND FOR THE USE AND BENEFIT OF HER MINOR CHILDREN, JOSEPH L. THIBAUT, JR., AND MARY CHARMAINE THIBAUT, PETITIONERS.

By _____
FRED G. BENTON
Counsel for Petitioners.

KERMIT B. GUIDROZ
BERT E. DURRETT
CALVIN E. HARDIN, JR.
Baton Rouge, Louisiana.
Of Counsel for Petitioners.

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